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fiction. In view of the large number of exceptions, therefore, it is not surprising that the Supreme Court has recently called it "the now vanishing fiction of identity of person."²¹ In this country, then, unless the wife has wrongfully deserted her husband, she may acquire a residence in a jurisdiction other than that of her husband and if she does so *bona fide* and with the intention of remaining, she may sue for divorce as a resident within the meaning of the divorce statutes.

EFFECT OF FAILURE TO EMBODY A CONTRACT IN A FORMAL DOCUMENT AS INTENDED.—The sufficiency of a contract by mere offer and acceptance without the execution of a contemplated formal instrument, in cases where the Statute of Frauds does not apply, has given rise to much litigation. The general underlying principle is well settled, but the application to particular cases is by no means easy. Consequently courts have adopted certain standards to aid them in determining the true intent of the parties.

There are, however, two distinct lines of cases where the intention of the parties is so clearly expressed that the solution consists in merely carrying it out. In the first group, the embodiment of the terms of a contract in a formal instrument is made one of the conditions of the agreement. Here, obviously, until such agreement is executed, either party may recede, for the offer is not accepted in all its terms until the formal document is signed.¹ In contrast with these cases, are those in which there is nothing more than a mere suggestion during the course of the negotiations that a more formal written contract is to be executed. The recent case of *United States v. P. J. Carlin Const. Co.* (C. C. A., 2nd Cir., 1915) 224 Fed. 859, belongs to this latter class of cases, and there the court decided that a binding valid agreement existed between the parties, although the formal document contemplated was never executed. This case was undoubtedly correct in its decision, for if both intend that such a document be but a particular kind of evidence of an already binding obligation, then the court ought properly to refuse to release one party from his obligation simply because no document has been drawn up.²

There are, however, a large number of cases in which, as the parties have not made their intention so manifest, it is more difficult to ascer-

²¹*Williamson v. Osenton* (1914) 232 U. S. 619.

¹*Hodges v. Sublett* (1890) 91 Ala. 588; *Las Palmas Winery and Distillery v. Garrett & Co.* (1914) 167 Cal. 397. In *Rossiter v. Miller* (1877) L. R. 5 Ch. D. 648, James, L. J., says at page 658: "On a question of construction, different minds may differ, but, for my part, I have often felt that in cases of this nature parties have found themselves entrapped into contracts by letters which they wrote without the slightest idea that they were contracting." To the same effect Fry, J., in *Bonnewell v. Jenkins* (1877) L. R. 8 Ch. D. 70 at page 72 says: "Now if the matter were not covered by decision, it is very probable that I should feel myself drawn to the conclusion that wherever there is a reference to a future contract the letters themselves do not constitute a contract, and for this very obvious reason, that a reference to a contract as a future thing seems to negative the notion of the existence of a contract as a present thing."

²*Whitted & Co. v. Fairfield Cotton Mills* (C. C. A. 1913) 210 Fed. 725; *Jungdorf v. Town of Little Rice* (1914) 156 Wis. 466.

tain their exact intention.³ Once the courts can find it, they will carry it out, and if the parties do not intend to be bound until the document is drawn, then the court will not hold them to any obligation; while if they do, then neither can recede. In such circumstances the court will take various facts into consideration as indicia of what the parties really intended: (1.) Is the contract one of a class that is usually found in writing?⁴ (2.) Is it of such a nature as to need a formal writing for its full expression?⁵ (3.) Has there been a mere understanding between the parties?⁶ (4.) Has the contract few or many details?⁷ (5.) Is it settled in all its essential elements?⁸ (6.) Is the amount large or small?⁹ (7.) Do the negotiations themselves indicate that a written draft is contemplated as the final conclusion of the negotiations?¹⁰ Furthermore, some courts have gone so far as to hold that in any case the one who denies the contract, by allowing the other to continue under what he supposes to be a binding agreement, has waived his right to say that there was no contract intended until the formal instrument is drawn.¹¹ The difficulty with this result is that it overrides in a certain class of cases the accepted standard of interpretation, namely the intention of the parties as expressed, by the imposition of a positive rule of law. It has also been decided that while the party cannot sue on the formal agreement, yet the negotiations may have proceeded so far that an action may be maintained for a failure to execute this formal agreement.¹² Since the damages allowed are the same as those in an action on the formal document, the result is to change the form rather than the substance of the liability.

There seems to be little reason for differentiating between written and verbal contracts looking to a formal document, and on theory the same reasoning should apply in both cases.¹³ If there is a meeting of the minds, words as well as writings can be evidence of the contract. But in the case of the *United States v. P. J. Carlin Const. Co.*, *supra*, the court intimated that a contract, looking toward a formal

³*Bell v. Offutt* (1874) 73 Ky. 632; *Sherry v. Proal* (1912) 206 N. Y. 726; see *Avendano v. Arthur & Co.* (1878) 30 La. Ann. 316. The burden of proof is upon the party who maintains that the agreement was completed without the necessity of the written agreement. *Mississippi etc. Co. v. Swift* (1894) 86 Me. 248.

⁴*Water Commrs. of Jersey City v. Brown* (1866) 32 N. J. L. 504; but see *Cochrane v. Justice Mining Co.* (1891) 16 Colo. 415.

⁵*Connery v. Best Saxby & Co.* (1884) 1 Cab. & E. 291; see *Brauer v. Oceanic Steam Nav. Co.* (1904) 178 N. Y. 339.

⁶*See Cohn v. Plumer* (1894) 88 Wis. 622.

⁷*Page v. Norfolk* (1894) 70 L. T. R. N. S. 781; see *Irish v. Pulliam* (1891) 32 Neb. 24.

⁸*Methudy v. Ross* (1881) 10 Mo. App. 101; *Shephard v. Carpenter* (1893) 54 Minn. 153.

⁹*Mississippi etc. S. S. Co. v. Swift, supra.*

¹⁰*Morrill v. Tehama M. & M. Co.* (1875) 10 Nev. 125; see *Allen v. Chouteau* (1890) 102 Mo. 309.

¹¹*Paige v. Fullerton Woolen Co.* (1854) 27 Vt. 485; *Riggins v. Missouri etc. R. R.* (1881) 73 Mo. 598; see *Miller v. McManis* (1870) 57 Ill. 126.

¹²*Pratt v. Hudson R. R.* (1860) 21 N. Y. 305.

¹³*Blaney & Morgan v. Hoke* (1863) 14 Oh. St. 292; *Peck v. Miller* (1878) 39 Mich. 594, holding that the oral agreement if acted upon by both parties becomes conclusive.

instrument, might not be binding in any case where the negotiations were wholly oral.¹⁴ The only reason for such a distinction is that the parties are more likely to want a formal document where the contract has been verbal; and so it might be said that in such a case there is a presumption that the formal instrument was intended as a condition.

ESTOPPEL WITHOUT MISREPRESENTATION.—Although estoppel was regarded originally as odious because it prevented a person from asserting and proving the real truth or what he claimed to be the truth, its range has been widened steadily by the courts, quick to observe in its principles the possibilities of convenient short cuts to justice.¹ Three main divisions of estoppel are now generally recognized: estoppel by record, by deed, and *in pais*.² This last class is sub-divided along lines bearing a striking resemblance to those by which the several varieties of contracts are differentiated. For just as true contracts arise from the intent of the parties, either as expressed or as inferred from their actual conduct, so estoppels may originate in agreements, either implied in fact or express.³ And as the law creates quasi-contractual obligations to frustrate injustice, regardless of the intent of the parties, just so does it raise estoppels to prevent a person from taking unfair advantages, either by overriding contracts whose performance by the other party has already awarded him permissive possession of something, or by utilizing his own misrepresentations.⁴

An excellent example of estoppel raised by law, is afforded by a recent New York decision, *Farnsworth v. Boro Oil & Gas Co.* (1915) 216 N. Y. 40, which also illustrates the tendency of the courts to enlarge the scope of estoppel to work out substantial justice. Natural gas companies organized under the Business Corporation Law are required to obtain the consent of the Commissioner of Highways,⁵ now Town Commissioner,⁶ before invading the highways of towns with pipe lines. Similar corporations organized under the Transportation Corporation Law must likewise obtain official permission, but from the Town Board.⁷ The defendant was formed under the Business Corporation Law yet applied to the Town Board, who granted the corporation permission to lay its pipes, but fixed, as a condition of their grant, the maximum price the company might charge consumers.⁸ After a

¹⁴See also a dictum to the same effect in *Sanders v. Pottlitzer Bros. Fruit Co.* (1894) 144 N. Y. 209.

¹Bigelow, *Estoppel* (6th ed.) 5-6.

²Bigelow, *Estoppel* (6th ed.) 5; Cababe, *Estoppel*, 1-5.

³*M'Cance v. London & N. W. Ry.* (1861) 7 H. & N. 477; *Hoeger v. Chicago M. & St. P. Ry.* (1885) 63 Wis. 100; Cababe, *Estoppel*, 6-12; Bigelow, *Estoppel* (6th ed.) 495, 496.

⁴*McStea v. Matthews* (1872) 50 N. Y. 166; *Tilyou v. Reynolds* (1888) 108 N. Y. 558; Cababe, *Estoppel*, 12-44, 45-47; Bigelow, *Estoppel* (6th ed.) 491, Chap. XVII, 602-604.

⁵N. Y. Laws of 1875, c. 611; Laws of 1889, c. 422, § 2.

⁶N. Y. Highway Law, L. 1909, c. 30, § 43.

⁷N. Y. Laws of 1909, c. 219, § 61.

⁸It is generally held that municipal authorities may as a condition of granting a franchise to a public service corporation, fix reasonable rates. 3 Dillon, *Municipal Corporations* (5th ed.) 2144; *Simons Sons Co. v. Mary-*